# THE OPPORTUNITIES AND RESPONSIBILITIES OF AMERICAN LAW SCHOOLS.[1]

WITH two bodies dealing in general with the subject of legal education, the Section of Legal Education and this Association, meeting annually, and with occasionally a third, the Conference of State Boards of Law Examiners, each endeavoring to present papers and arouse discussion, it is obvious that the number of new questions which anyone may hope to suggest is necessarily small. Most of the important questions have already been discussed, many of them more than once, and anything which is now presented is likely to smack of the truism or the platitude.

The very remarkable increase, however, both in the number of American law schools and in their attendance, suggests some questions concerning their influence upon American law and their responsibility for its development which seem worthy of consideration.

In a government like our own, a government "of laws and not of men," the question of the influences which have the most to do with the actual growth and development of the law cannot fail to be of importance.

One does not need in such a presence as this to call attention to the pre-eminent part which the legal profession takes in the making of our laws, whether in the form of constitution, statute or judicial decision. It is doubtless true that in every constitutional convention that has ever sat the most influential members, if not a clear majority, have been lawyers. In every legislature, both state and national, the same condition exists. While in respect of the law evolved by judicial decisions, which yet remains the largest and most vital department of our law, the legal profession holds undisputed sway. The judges who decide the causes, the advocates who argue them, all are lawyers coming from a common source.

If we assume that in these various functions of law making, constitutional, legislative and judicial, the participants are actuated by some conscious motive, that they are aiming to create good government, enact wise provisions and enforce justice among men, and then consider the question of the ideals toward which they aim, the standards of wisdom and fitness which they will seek to establish, the sentiments of justice by which they will be governed, it will be evident that the forces which play the most conspicuous

[1] A paper read at the annual meeting of the Association of American Law Schools at St. Paul, August 28, 1906.

part in the formation of these ideals, in the establishment of these standards and the arousing of these sentiments, must be worthy of attention. The influences which mould the lawyer are among the most potent of those which shape the welfare of the state.

In the making of the lawyer the law schools of the past have certainly taken a most important part. To estimate properly their effect we must take into consideration not only those who came directly within their walls as students, but also the vast numbers who indirectly fell beneath their influence.

Large as was the number, for example, of those who listened to regular instruction in the class room at Harvard Law School in the days of Story, Greenleaf, Parsons and Washburn, they were few compared with those whose legal learning was obtained by the constant study of those great books, the classics of our American law, which these teachers produced, a situation wholly without a parallel in any other school or any other time. Great as was the army of young men who yearly came to listen to the lectures of Judge Cooley and his associates, it was small compared with the number of those who in every part of the land were poring over his published books. Great as was the fame and influence of Judge Story and Judge Cooley and Chancellor Kent as judges, everyone will agree with me in saying that their reputation rests vastly more upon the books which they wrote as law teachers than upon the opinions they pronounced as judges. No judge who has lived in this country, or any other, not even Marshall, has had so large and so direct an influence upon the immediate training of the Bar as these men have had as teachers and writers. Professor Gould and Professor Pomeroy are entitled to be included with them.

In this respect, that is, of teaching through the general treatises issued from them, the influence of the law schools has almost entirely passed away. Very little of such work is now being done in them, nor is there any indication that it is likely to be revived. Methods and conditions have changed, and new times and new manners have taken their places.

Great, however, as was thus the influence of the law school of the past, the law school of the future is destined to have a greater, though operating in a different way.

Everywhere, as the result of a variety of causes,—the increase in number of the schools, the improvement in their equipment and methods of teaching, the new requirements for admission to the Bar demanding better preparation,—the proportion of the young men coming to the Bar, who are getting their preparation in the law schools, is constantly increasing and will continue to grow.

When I was admitted to the Bar, now more than a quarter of a century ago, and the older members here will tell the same story, there were more young men studying law in the law offices than in the law schools. The time has now come when a law student in a busy office is an anachronism, and he will soon be a curiosity. The direct and immediate influence of the law schools was never so great as it is now.

The indirect influence of the law school of the present is also marked, especially in its effect upon the standards prevailing at the Bar examinations. In the first place, the changes in the law, which are so largely doing away with the old time local examination by ephemeral committees and substituting state boards with their improved methods, have quite largely been the result of the influences and demands of the law schools. And in the second place the standards and methods prevailing in the law schools have had a marked effect upon the standards set by the state boards. In many instances, and in a growing degree, the members of these boards are law school graduates (in some cases law school teachers) in sympathy with the aims and standards of the schools, and they thereby become excellent advocates of progress and reform. Both directly and indirectly, therefore, the law school has come to be the chief factor in the education of the Bar.

What does all this mean for the future of the American law school? In the first place, it means an enlarged demand for men and equipment, and for better men and better equipment. If the work is to be properly done, there must be trained men to do it; they must be supplied in such numbers that they can adequately perform it; they must be given such compensation and such opportunities that men of the best ability can be induced to devote themselves unreservedly to the work of teaching, and there must be such equipment of buildings and libraries that the facilities will be found at hand to do the work properly.

It means, in the second place, an enormous opportunity. Contemplate for a moment what it means to be able to train the men who directly and indirectly are to exercise the most potent influence over the growth and development of our law. We have in this country today, I suppose, considerably over one hundred law schools with something like fourteen thousand students. Think what it would mean if the thirty-five hundred or so of young men who now go out yearly from these law schools to every town and city in the land could go with not only the best possible training in the law, but with the highest possible ideals as to its duties and responsibilities and the strongest possible ambition for its improve-

ment and advancement. I wonder if we fully realize what this practical monopoly of the law teaching means? And especially what it means to this Association? It means, of course, that this Association, made up of the most important and influential law schools in the country, has substantial control of the business. It means that, if this Association improves its opportunity and does its duty, whatever is *best* in standards of admission, methods of instruction, order and contents of curricula may be established. What has already been accomplished in the way of requiring a three years course is a fair example of the possibilities.

It is, of course, true that the law faculties do not hold the purse. But it is also true that, practically everywhere, the managing boards or bodies of our law schools have been quick to respond to every well considered proposal for the raising of standards and improvement in the quality of the work. In some cases they have actually taken the initiative and insisted that dormant faculties should awake and move.

It means also an enormous responsibility. Responsibility is usually commensurate with opportunity, and this case is no exception. If the law schools are to train the lawyers of the future, they must themselves be equal to the task. They must be filled with legal learning, and the capacity and fitness to impart it.

Our law schools must, of course, be first and always the places wherein the best legal teaching is to be found—teaching that shall be serious, thorough and effective. Whatever is best in methods must here be found, though methods are only the means and not the end. As "life is more than meat and the body more than raiment," so the end to be attained is here of more importance than the method by which we reach it. The end is to arouse the student's interest and enthusiasm, to teach him how to think and how to reason in a legal way, to ground him in the great principles of the law, to teach him how to use the tools of his profession and to inspire him with a love of justice and a sense of honor that will make him a worthy member of a learned and honorable profession.

I think we are inclined in these days to say too much about methods and to convey the impression that some of us think we have a sort of patent upon the only right way, and that if the student will only pursue our method he will have a guaranty of success. I have no hesitation in saying that after a considerable experience with many methods I believe that, under the right circumstances and conditions, the careful study of decided cases is best calculated to attain the ends we seek. But I realize fully that men can be well trained by other methods, and I firmly believe that the man is more

than the method. Professor Dwight was a great teacher under one method, Professor Langdell under another and Judge Cooley under still another. Give us, then, *men* and *teachers* in our law schools and the methods will take care of themselves.

I think, moreover, that we shall make a mistake if we put into our law schools too many men as teachers who have had no practical experience at the Bar. It is, of course, true that the mere fact that one is a good or even a great lawyer or judge gives no assurance that he will be a good teacher, but on the other hand I believe that, in the main, no man can be really the best teacher of the law who has had no experience in practice. Law is so distinctively a practical science, it exists so necessarily for purely practical ends, so many elements enter into its operation and effect beside pure theory or clear logic, that some experience with its practical side seems to me to be essential not only to its fullest comprehension, but also to the most sympathetic and helpful attitude toward the needs and problems of those who are to practice it. Law, as it looks to the theorist in his study and law as it looks to the lawyer in consultation or the court room, are often radically different things. One of the greatest advantages of the so-called case system is, in my judgment, to be found here, that student and teacher alike are facing practical problems so far as one who lives simply in the experience of others can do so. It is, moreover, essential that the law schools shall keep in touch with the Bar. They must command its respect, inspire its confidence and receive its support. An occasional infusion of new blood, drawn from the active ranks of the profession, not only helps to accomplish this, but also serves to prevent a whole faculty from becoming too doctrinaire in its habits and tendencies of thought.

But there is another side to the law school than its purely teaching activity.

The law schools of this country must be the places wherein the most original and most scholarly legal investigation is carried on. The law teacher has, upon the whole, the best opportunity for this work. The practicing lawyer has usually neither the time nor the facilities for making an exhaustive study of his case. His view is a partisan one and his object is to succeed in one side of a particular cause. The judge upon the Bench has the advantage, usually, of a wide experience, and the opportunity to hear the case discussed by able counsel. He enjoys also the very important advantage of being able to see how the rule which he adopts will operate when applied to the actual affairs of men, and how it will fit into the general system of the law. As a rule, however, he does

not have time enough for the most thorough investigation of the matter, and especially does he lack the time or opportunity to study the whole of the field in which the particular question lies. He gets an intensive view of a small area rather than a comprehensive view of the whole field.

The law teacher, on the other hand, has, in the better schools at any rate, time to make himself a master of some particular subject, he has unsurpassed library facilities, he has the advantage of consultation with his colleagues who are also experts in cognate fields and he has the opportunity of hearing the discussions and answering the objections of successive classes of bright students whose arguments in many cases, as those who hear me will bear witness, would do credit to the older members of the Bar. He misses the keen interest of the advocate, he does not see the situation of the client, and, unlike the judge, he does not see so clearly how the rules which he evolves will operate in their actual application to a given controversy. But, on the whole, as has been said, he is doubtless in the best situation to make a leisurely, careful, exhaustive study of legal questions.

With the enormous growth in bulk of our law, with the increasing output of reports, with the constantly increasing number of new questions caused by the wonderful changes in our social and economic conditions, there is a constant and increasing demand that some competent persons shall sift and analyze and restate the principles of law which are being applied. Nowhere else can this be so intelligently and thoroughly done as by the law teachers of the country. Into the law schools, as into great laboratories, all these new ideas in law should come to be tested, compared, analyzed and reported upon. From these laboratories there should be constantly coming forth the reports of the tests and experiments which have been made upon them. Nothing can be more valuable than critical and exhaustive articles, monographs and the like, upon such special questions in the law, giving the result of intelligent research and competent analysis.

The day of the great treatises upon the larger branches of the law is passing by. The amount of time and labor required for their adequate production has become so great that few competent persons can be induced to undertake them. A thoroughly trained worker, moreover, toiling single-handed cannot compete with the machine-made books which now so much abound. Occasionally there will be a great work, the *magnum opus* of a life-time, like Professor Wigmore's recent treatise upon evidence, but the best work of the future is likely to be found in the articles and mono-

graphs of the experts. Already a good beginning has been made in this direction. The better law journals of the country, and especially those connected with the great law schools, are presenting an increasing number of thoughtful, exhaustive studies of important questions.

A great deal remains to be done in the way of the development of legal history. Much very noteworthy work has already been done in American law schools, but much more remains to be done. Nowhere else is there likely to be found either the temper, the time or the facilities for this important work, and the law schools of the country, in my judgment, will fail of their high duty if they do not undertake it.

From the law schools, too, must come the development of the scientific side of our law. Nothing in my judgment can be of greater interest and importance than the careful study into the nature of law, the analysis of legal ideas and the correlation and comparison of legal rules. If our law is ever to be more than an endless series of isolated instances, a chaos tempered by a digest, this work of analysis and synthesis must be forever going on. In this field the English teachers of law have thus far held almost undisputed possession, and their books are among the treasures of our legal literature. The field, however, is a great one, and from our law schools must come the American Austin, Holland and Salmond.

Opportunities to serve the state ought also to come to the law teacher in the way of suggesting needed changes or new enactments in legislation, drafting bills, serving upon commissions to revise the laws and the like. If our law is ever to be successfully codified, either in whole or in part, the work cannot fall into more competent or more willing hands than those of our law teachers. Already signal illustrations of this are found in the work of Professor Williston, and more is fortunately in sight.

Opportunity to serve as occasional legal adviser to state officers or public bodies should also come to the law teacher, especially in state universities. What could be more useful or more fitting than that in our law schools should be found a body of men, competent, trained, impartial and honorable, ready and willing to give their aid and counsel in the formation and settlement of public questions having a legal aspect? Instances are numerous in recent years where other faculties of the universities have rendered very distinguished and valuable service to the state—a conspicuous one has just occurred in Michigan. Why should not our law faculties do the same?

But in addition to the purely legal side of the question, there is another aspect of great significance and importance upon which I wish to touch. I mean the opportunity and responsibility of our law schools in developing the ethical side of the law and the profession.

It has been said that a lawyer has no more need to concern himself with moral questions than any other man; and sharp distinctions are insisted upon in many quarters between morality and law. I do not admit the first proposition, though it is entirely unnecessary to discuss it now. There are, of course, a great many rules of law which involve no moral question. Whether a seal shall be of wax or paper or a mere scrawl of the pen; whether one shall turn to the right, as with us, or to the left, as in England, upon meeting on the highway; whether the time for giving notice of dishonor of negotiable paper shall be twenty-four hours or forty-eight, all these and countless others involve no moral issue. We need some rule in order to get on, and any one of several will often do so long as we all know what it is and abide by it.

But on the other hand there are many questions, and they are the questions which most directly and vitally concern our lives and welfare, which do involve a moral element. All the questions of fraud, of good faith, of *bona fide* holder, of fiduciary relationship, of trusts, of "unfair competition," a large portion of the ordinary jurisdiction of courts of equity, many questions of torts and negligence and contracts, have a moral foundation and play a very important part not only in determining actual controversies, but also in forming the general moral standards of the community. Law is the official moral code of the community. It is the organized and manifest expression of the public sense of justice. It endeavors to establish and enforce what is believed to be the highest practical, workable, livable, ethical code.

If it be true, as I believe, that the present is seeing and that the future will witness in a still more marked degree the disappearance of many of the old sanctions, the breaking up of many of the old codes of belief, the shifting of much of the old emphasis; if it be true, as is often asserted, that the church is losing its hold upon men and that new forces are not arising to take its place, then the ethical code embodied in the law is likely to become more and more important. Here is something having authority. Here are definite and ascertainable sanctions. Here is a code which men must recognize and obey. Other standards may decay; this is living, active and potent. As others lose their influence and importance, this is certain to grow in significance and interest. Here is the standard

to which men must not only conform their conduct, but by which they may shape their ideals. It is of supreme importance that it be made as perfect as is possible.

Moreover, as society gets more and more complex, as population gets denser, as the competitions of life become fiercer, as the schemes, of which the air is full, for the improvement of social and economic conditions are urged for legal enforcement, new questions and new problems will constantly present themselves, and the imperative necessity for the formation and maintenance of sound and sane views by the Bench and Bar upon all of these moral and economic questions is certain to become more and more obvious. Where are these views to be developed and worked out? Nowhere else than in the American law schools.

I, of course, do not mean to say that the law school shall be turned into a Sunday school, but I do mean to say that in the law school class rooms these lego-ethical problems must be discussed and worked out, and the plastic minds of the youth who frequent these schools must be moulded to just and equitable convictions, and through them, as they join the active ranks of the Bench and Bar, must flow a constant stream of inspiration and enlightenment to keep pure and fresh the fountains of our law.

If it be objected that this is matter for a college course in ethics and not for a law school class room, I reply, first, that, even were the subject matter the same, all students do not get such work in college and that the college teacher has other ends in view; but, secondly and chiefly, that the objection shows an entire misapprehension of the point I seek to make. I do not mean that we shall merely teach ethics, but I do insist that ethical considerations are so involved in many of our most important and most pressing legal problems that we cannot separate them if we would, and that our duty is so to frame our teaching as not only to make our actual law conform as nearly as possible to right ethical standards, but also to enable it to guide the people by its precepts as well as to deter them by its penalities.

The ethics of the profession must also look to the law school for their inspiration and support. Surely no duty of the law school can be greater than this. It has within its halls the Bench and Bar of the future. They are there at their most plastic and impressionable age. At no period in their lives can right standards and right ideals be more certainly created. During this period must be sown the seeds which shall bear a harvest in after life. The reputation of the school may also be made to serve a useful purpose in this particular. To a pride in their profession and its require-

ments there may be added a pride in their law school connection which shall be an anchor when temptation overtakes them.

Never was there greater need of right standards in this matter than at the present moment. The whole character of the lawyer's relations and functions seems in danger of undergoing change. The influence, if not the taint, of commercialism is over the profession. To the time-worn popular complaints of the ethics of the legal profession, that a lawyer will espouse either side of any cause for money and sell his talent to the highest bidder, there is added in these days the criticism by men in high places that the best effort and ability of the profession are constantly retained by the greatest enemies of our people, the huge, soulless, monopolistic combinations of capital and labor, standing to exact toll at every gateway of commerce, at every vantage ground of opportunity, at every storehouse of natural wealth which should be common.

I do not undertake to say how much of this is true, how much mere slander, and how much based upon a misapprehension of the real situation. It is evident enough that there is a danger here, and, in my judgment, the law schools have not done their duty if they do not instill in the minds of their students such notions of the dignity of their calling, of their relations to the law and to the public, and of their duty to truth and honor and right conduct as will enable them to withstand the temptation, if it does come, to prostitute their talents to ignoble ends and to sell their birthright for a mess of pottage.

These, then, as I have briefly outlined them, seem to me to be the opportunities and responsibilities of the American law school. The realization of them would seem to be ample reward for the best effort of any association of men. If they can be actually realized, then, in my judgment, the practice of the law will fufill its appropriate mission and the profession of law teaching will attain its proper dignity and importance.

FLOYD R. MECHEM.

UNIVERSITY OF CHICAGO.